

IN THE COURT OF CRIMINAL APPEALS  
FOR THE STATE OF TEXAS

FILED  
COURT OF CRIMINAL APPEALS  
5/3/2018  
DEANA WILLIAMSON, CLERK

JOHNNIE DUNNING  
APPELLANT

V.

CCA NO. PD-0445-18  
COA NO. 02-17-00166-CR  
TRIAL COURT NO. 0632435D

THE STATE OF TEXAS,  
APPELLEE

APPEALED FROM CAUSE NUMBER 0632435, IN THE 371<sup>st</sup>  
DISTRICT COURT OF TARRANT COUNTY, TEXAS; THE  
HONORABLE MOLLEE WESTFALL, JUDGE PRESIDING.

APPELLANT'S REPLY TO THE STATE'S  
PETITION FOR DISCRETIONARY REVIEW  
TO THE SECOND COURT OF APPEALS

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\*\*\* Appellant requests oral argument, if the Court grants the State's Petition for  
Discretionary Review

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## **TO THE HONORABLE COURT OF CRIMINAL APPEALS:**

This is a reply to the State's Petition for Discretionary Review in this case.

The Court of Appeals for the Second Appellate District handed down a decision on March 1, 2018. That decision reversed the trial court and ordered that the trial court issue a favorable finding for *Art. 64, C.C.P.* purposes. The State filed a Motion for Rehearing and Motion for Rehearing En Banc which was denied by the Court of Appeals on March 29, 2018.

## **REPLY TO THE STATE'S REQUEST FOR ORAL ARGUMENT**

The State has requested oral argument. If this Court grants review, Appellant requests oral argument. Oral argument was granted on direct appeal, and this Court could review that argument online in determining whether to grant oral argument, in the event this Court grants the State's Petition for Discretionary Review.

## **REPLY TO THE IDENTITY OF PARTIES AND COUNSEL AND STATEMENT OF PROCEDURAL HISTORY**

The Statement of Procedural history and Identity of Parties and Counsel provided by the State is accurate.

## **APPELLANT’S REPLY TO THE STATE’S CONTENTIONS**

The State incorrectly characterizes the voluntariness of Appellant’s guilty plea. Appellant pled guilty pursuant to a plea agreement. It was followed by the trial court, and an appeal was allowed from the denial of a pretrial motion. The issue was whether another person, Lorne Clark, a convicted sex offender, step father of the victim in this case, and presently in jail with two new charges for sexually assaulting two other children in the same home as the victim, might have been the actual offender. This issue was preserved and affirmed on appeal, and discretionary review was denied. At no time did Appellant claim his plea was involuntary, rather, his decision to plead guilty was as a result of the denial of being able to present his strategy that another person might have been the perpetrator.

## **WHAT EVIDENCE SHOULD BE CONSIDERED**

The State presents its issue as what “other evidence” should be balanced against the new DNA results. Interestingly, in the *Art. 64, C.C.P.* hearing on February 28, 2017, the State specifically objected to any testimony about the original trial, as such testimony would be outside the scope of an *Art. 64.04, C.C. P.* hearing, which the State has now provided in a supplement to its Petition. February 28, 2017 hearing, RR-2, Pages 9-11. The State continued to object on this matter, and the trial court restricted Appellant’s attempt to consider evidence from the circumstances of the plea.

RR-2, Pages 15-22; Motion for New Trial Hearing, RR-2, Pages 44-47.

### **FACTS SET OUT BY THE STATE ARE INACCURATE**

On page 17 of its Petition for Discretionary Review, the State avers that James Oliver was the initial adult witness, and includes this testimony from the original trial/plea in this petition. The State has attached the trial court's record concerning Appellant's plea, which also discusses Allen Beavers. Contrary to the assertion on page 17 of the State's PDR, Beavers was the original suspect, not Appellant. This is also noted in Defense Exhibit 9, Page 41 (pages unnumbered) The original description of the perpetrator is of a black male. Lorne Clark is white, and Appellant and Beavers are both black. What is not in that reporter's record of the trial court, but is in the police report (Def. Ex 9) (sealed) is that the initial description is that the assailant had *facial hair* as well.

The victim's description included a description of a "big black man with a beard and mustache". Beavers is listed as having a goatee and mustache, Appellant has no facial hair. This person was pointed out by the victim to James Oliver (W3), who in turn provided that description to the police as a black male, 5'11", 220 pounds, goatee and mustache, wearing beige slacks, blue and white stripe shirt and a ball cap. Janetta and Lorne Clark, the victim's parents recognized this initial, first description as that of Allen Beavers, who lived in the apartment complex. Def. Ex 9, Page 41

(pages unnumbered). Thus, the State's assertion that the victim initially identified *Appellant*, on page 17 of its Petition for Discretionary Review is not true.

Additionally, Lorne Clark, while in jail on his sexual assault charges, wrote Judge James Wilson (judge before Judge Westfall), stating that he had never seen Appellant. Clark's letter states "The only time I met Johnnie Dunning is in the tank hear [sic] in jail." Def. Ex. 1, Motion for New Trial Hearing, RR-2, Pages 13-14, 48-51; RR-3, Pages 5-6. Either Clark was originally talking about Allen Beavers instead of Appellant, or he was lying. Either way, the letter should have been disclosed to Appellant's trial counsel, which it was not.

### **REPLY ARGUMENT**

The only issue which should be considered at this juncture, per the statute, is whether the DNA evidence results of the Serological Research Institute, "Seri" which exclude Appellant and indicate another person's DNA is present, agreed to by the State's expert, and which were taken by the DPS lab at relevant areas, are more likely than not (51%) to prove that Appellant would have been found not guilty, had those results been shown at trial.

Dr. Budowle, the State's DNA expert, disputed the findings of Amy Lee of Seri, Appellant's lab expert, solely over Lee's opinion that the complainant was or was not excluded in sample 4-3. (Conclusion 5.) This has nothing to do with whether

Appellant was excluded and someone else's DNA was present. [February 28, 2017 hearing] RR-2, Pages 82-83.

The exclusion of Appellant and a third person's DNA being was present was not disputed, whether at the **Chapter 64 C.C.P.** hearing, before the Court of Appeals, or now. Appellant was excluded at items 4-4 and 5-2 as the major and minor contributor. February 28, 2017 hearing, RR-2, Pages 47-51. This is a different and distinguishing argument than just one requesting relief because *Appellant's DNA alone* was not present. Someone else's DNA is present as well.

Dr. Budowle's unequivocal testimony in the February 28, 2017 hearing, is as follows:

Q. But the fact of the matter is you don't have any dispute that this little boy's underwear has both his DNA on it and got somebody else's DNA on it, right?

A. I don't dispute that, no.

Q. And that somebody else's DNA is not Johnnie Dunning's?

A. I don't dispute that no.

[February 28, 2017 hearing] RR-2, Page 99, Lines 13-22.

Dr. Budowle offered an opinion on contamination possibilities, which had no factual basis. February 28, 2017 hearing, RR-2, Pages 87-89.



The evidence reflects that the chain of custody was not contaminated. The complainant neither bathed nor changed clothing prior to the collection of the shorts by the police. This was undisputed by the State. Sexual Assault exam (Sealed), Defendant's Exhibit 7, and Case file, Defendant's Exhibit 9, (Sealed), both from the February 28, 2017 hearing.

All of these matters would be more appropriately addressed in an *Art. 11.07 C.C.P* hearing, with live testimony to consider not only the DNA findings, but Brady issues, Allen Beavers' and/or Lorne Clark's DNA if obtainable, and actual innocence claims. Relevance in a wider scope would be appropriate at that time.

Appellant would suggest that an *Art. 64, C.C.P.* hearing inquiry is synonymous to a CODIS DNA hit or a police officer's portable breath test unit used at a traffic stop. Both of these procedures establish probable cause for a further inquiry to a confirmatory lab test or a search warrant.

The standard of proof for CODIS, a portable breath test unit, and a DNA test result for purposes of *Art. 64, C.C.P.* is the same, i.e. 51 % likelihood Appellant would be acquitted had the DNA results been presented and probable cause, i.e., more likely than not.

Given the nature or the location of where the DNA swabs were taken from (State's lab's choice), the existence of foreign DNA (two persons' DNA, neither are

Appellant's), undisputed agreement on this issue, and a valid chain of custody, Def' Exhibits 7, Page 4 (sealed) and 9 (victim not only didn't bathe or wash clothing, and didn't change clothes before going to the sexual assault exam), Appellant submits he proved by a preponderance of the evidence that had this evidence been presented at a trial there is a 51 % chance he would have been acquitted, and the Court of Appeals properly reversed the decision of the trial court. This Court should deny the State's Petition for Discretionary Review.

The Court of Appeals' decision is consistent with this Court's decision in ***Smith v. State*, 165 S.W.3d 361, 363-64 (Tex.Crim.App. 2005)**. In ***Smith***, this Court held that the testimony by the victim indicated that seminal fluid was left by the attacker rebutted the State's argument that even if the DNA does not match Smith, he could still be guilty because the attacker may not have left behind any seminal fluid because the victim in ***Smith*** testified that there was seminal fluid left *by the attacker*. In this case, Appellant is alleged to anally sexually assaulting the victim. The DNA shows someone else's DNA was present in the relevant place, which is completely different than Appellant's DNA simply not being present, with no other finding. The Court of Appeals decision does not conflict with decisions of this Court.

The Court of Appeals decision is also consistent with a previous decision of its own. ***Solomon v. State*, 2015 WL 601877 (Tex.App. – Fort Worth, February 12,**

*2015, no pet.)(not designated for publication). Solomon, supra*, was cited by the State on direct appeal as authority that the absence of DNA does not indicate innocence. State's Brief - Second Court of Appeals, Page 10. This was discussed at oral argument of the Second Court of Appeals 1-9-18, at approximately 13 minutes into the argument. Appellant pointed out at oral argument that two sentences later in *Solomon* appears language that says the absence of the Defendant's DNA is not important, unless there is *presence of another person's DNA* on the item in question. The State did not cite *Solomon, supra*, in its Petition for Discretionary Review.

During oral arguments on January 9, 2018, Justice Meier asked Mr. Conder, the attorney for the State whether Mr. Conder would be comfortable with the position that if the State had low level DNA that implicated the defendant, would the State then take the position that since such a fact would be disregarded since it should not be considered. Mr. Conder replied that he would just consider this a *non DNA case, ... because all the DNA takes us back to the victim*". In this case it takes us back to the victim *and someone else*.

The two courts of appeals decisions cited by the State for the proposition that are in conflict with the Court of Appeals in this case is also inaccurate. Both decisions, one not published, hold that exculpatory DNA testing results are irrelevant when DNA testing is not relied on or there is no physical evidence connects the

defendant with the crime. *Glover v. State*, 145 S.W. 3d 858, 862 (Tex.App.–Houston [1<sup>st</sup> Dist.] 2014 pet.ref’d.); *Ewere v. State* 2017 WL 5559585 (Tex.App. November 16, 2017) ( *not designated for publication*). Neither case addresses when DNA is a relevant matter in the case, and an unknown person’s is present, when it should not otherwise be present.

### **PRAYER**

Appellant Prays that the State’s Petition for Discretionary Review be denied.

RESPECTFULLY SUBMITTED,

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## **CERTIFICATE OF SERVICE**

I certify that a true copy of Appellant's Reply to the State's Petition for Discretionary Review was electronically delivered to the office the Criminal District Attorney of Tarrant County, Texas, 401 W. Belknap St. Ft. Worth, Tx. 76196; the State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711, and mailed to Appellant, on the date indicated by the electronic file stamp.

/S/ WILLIAM H. "BILL" RAY  
WILLIAM H. "BILL" RAY

## **CERTIFICATE OF COMPLIANCE**

This document complies with the typeface requirements of Rule 9.4 (e), of the Texas Rules of Appellate Procedure because it has been prepared in a conventional typeface no smaller than 14 point for text and 12 point for footnotes. It complies with the word count limitations of Rule 9.4 (I) because it contains 2390 words, excluding any part exempted by Rule 9.4 (i)(1), as computed by WordPerfect, the computer software program used to prepare this document.

/S/ WILLIAM H. "BILL" RAY  
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